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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1443

ROBERT COSTA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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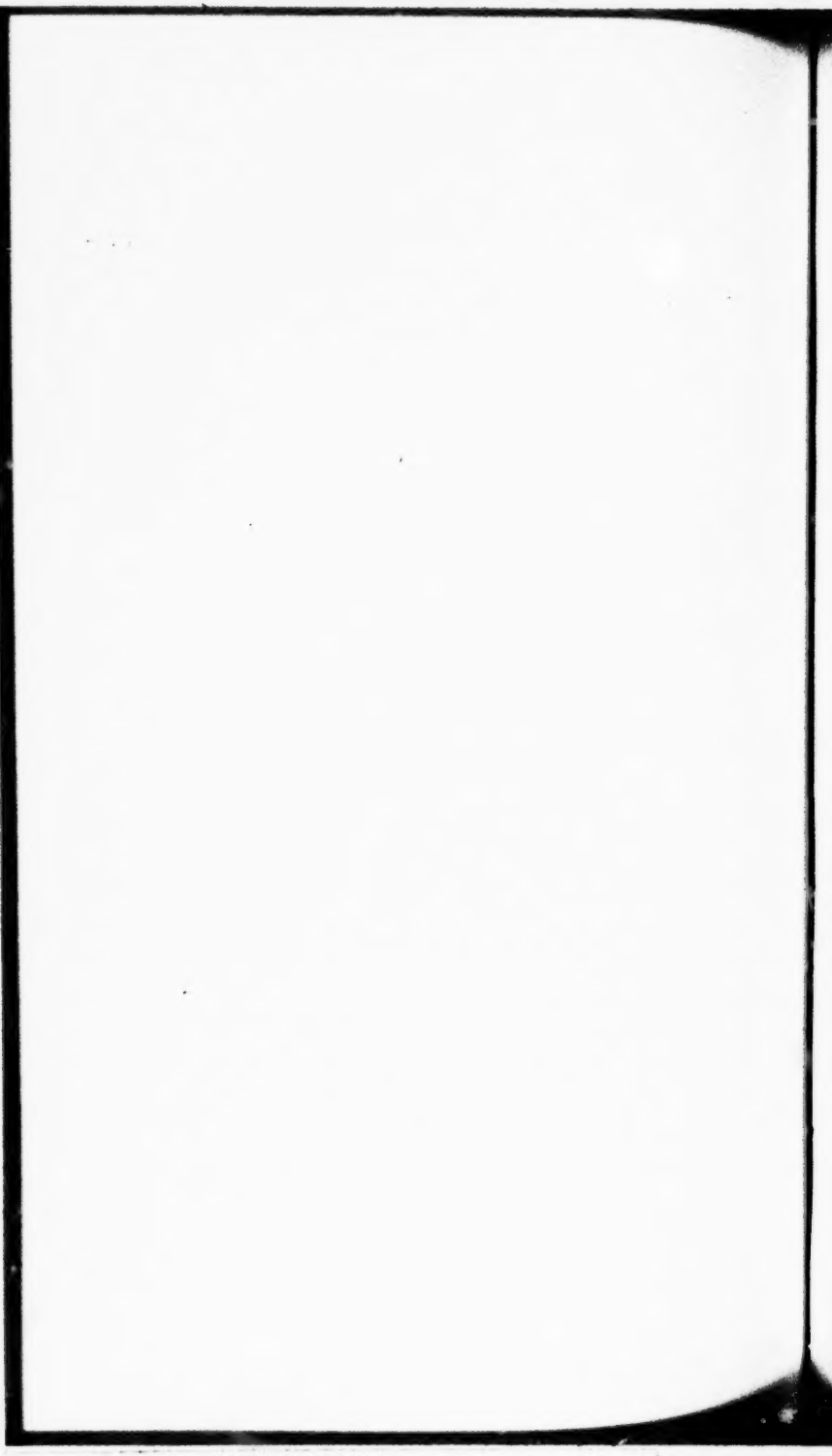

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TABLE OF CONTENTS

PAGE

Jurisdiction 1

Questions Presented 2

Constitutional and Statutory Provisions Involved .. 3

Statement of the Case 3

Statement of Facts 3

POINT I—The petitioner was denied his Sixth Amendment right to confrontation of witnesses and to compel the attendance of witnesses by the trial court's ruling that the Government need not reveal the identity of an informer. To make matters worse, the court also denied a one day adjournment so that petitioner might try to find the informer himself. This naturally also violated the Fifth Amendment right to due process of law because it precluded a fair trial 14

POINT I-A—Petitioner Costa has sufficient standing to seek (1) the identity of the informant, and (2) his appearance at the trial 19

POINT II—The statutes 21 U.S.C. 173 and 174 in essence create a presumption of guilt. This violated the petitioner's rights against self incrimination .. 20

POINT III—The petitioner was extremely prejudiced by the trial court's refusal to preclude the prosecutor from adducing evidence of prior convictions when Costa took the stand in his own defense. Since the statutes, 21 U.S.C. 173, 174, requires an explanation if the automatic presumption of guilt is not to be raised, it is clear that a person accused

PAGE

under the statutes must be permitted to testify and that testimony should not be discouraged or weakened by the introduction of unconnected or extraneous evidence that the defendant has previously been convicted of a crime not germaine to this prosecution.

The trial court however refused to restrict the prosecutor in pursuing this line of cross examination, and, consequently, petitioner was severely prejudiced. The rule with respect to cross examination ought to be that such evidence may not be introduced unless the prosecutor can convince the trial court that its introduction is essential 22

POINT IV—The evidence adduced at trial was so contradictory and so conflicting that the court should not have even submitted the case to the jury. While the foregoing points are in themselves sufficient to warrant granting certiorari the record should be looked upon in this light, especially since the name of the informant was withheld 35

CONCLUSION 39

A. Act I—The 52nd Street Bar 36

B. Act II—A Room at the Americana Hotel .. 37

C. Act III—The Bon Soir Club 38

D. Epilogue 39

APPENDIX A—Opinion of Second Circuit 41

APPENDIX B 49

APPENDIX C 51

BLEED THROUGH POOR COPY

PAGE

Authorities Cited

Cases

Alderman v. United States, 394 U.S. 165 (1969) 18
Alford v. United States, 282 U.S. 267 18

Brady v. Maryland, 373 U.S. 83 16
Bryson v. United States, 396 U.S. , 90 S. Ct. 355 (1969) 20
Buie v. United States, 38 USLW 4019 ..... 20, 21
Burgett v. Texas, 389 U.S. 109 (1967) 34

Commonwealth v. Carter, 233 A. 2d 484 (Penna) ... 16

Eleazer v. Superior Court (Supreme Court California, 1/30/70) 15, 16
Estes v. Texas, 381 U.S. 532 (1965) 27
Evans v. United States, 397 F. 2d 675 (D.C. Cir. 1968) 30

Fontaine v. California, 390 U.S. 593 18

Gertz v. Fitchburg Ry. Co., 137 Mass. 77 (1884) 24
Gordon v. United States, 383 F. 2d 936 (1967) 28

Leary v. United States, 395 U.S. 6 (1969) 20, 21
Luck v. United States, 348 F. 2d 763 ..... 27, 28, 31, 32

Marchetti v. United States, 390 U.S. 39 ..... 20, 21
Minor v. United States, 38 USLW 4019 ..... 20, 21

Nutter v. State, the Maryland Court of Special Appeals (6 Cr. L. 2376, decided February 10, 1970) .. 16

Roviaro v. United States, 353 U.S. 53 (1957) 15

Sheppard v. Maxwell, 384 U.S. 333 (1966) 27
Smith v. Ilinois, 390 U.S. 129 ..... 17, 18
Spencer v. Texas, 385 U.S. 554 (1967) 25, 26
State v. Coca, 80 N.M. 95, 451 P. 2d 999 (1969) 33
State v. Hawthorne, 228 A. 2d 682 (N.J. 1967) 31
State v. Motley, 199 Kan. 335, 430 P. 2d 264 (1967) .. 33

PAGE

State v. Nabes, 28 Comm. 28, 248 A. 2d 242 21
Stump v. Bennett, 398 F. 2d 111 21

Tot v. United States, 319 U.S. 463 ..... 35, 36, 39
Turner v. United States, 38 USLW 4103 (January 20, 1970) 20

United States v. Agucci, 310 F. 2d 817, Cert. Den. Sub. Nom. Giuppone v. United States, 372 U.S. 959 19
United States v. Augenblick (1969), 393 U.S. 348 .. 15, 18
United States v. Clarke (1963), 220 F. Supp. 905 . 15
United States v. Day (3d Cir.), 384 F. 2d, 464 (1967) 17
United States v. Gainey, 380 U.S. 63 36
United States v. Hilbreth, 387 F. 2d 328 (4th Cir. 1967) 32
United States v. Knox, 396 U.S. , 90 S. Ct. 363 (1969) 20
United States v. McCarthy, 298 F. Supp. 5561 (S.D. N.Y. 1969) 21
United States v. Palumbo, 401 F. 2d 270 (2 Cir. 1968) cert. denied, 394 U.S. 947 (1969) 24, 31, 32
United States v. Romano, 382 U.S. 136 36
United States v. Sternback, 402 F. 2d 353 (7th Cir. 1968) 32

Velarde-Villarreal v. United States (1965), 354 F. 2d 9 15

Young v. Florida, 203 So. 2d 650 (1967) 21

United States Constitution

Fourth Amendment 3
Fifth Amendment 2, 3
Sixth Amendment 2, 3
Eighth Amendment 3
Fourteenth Amendment 3

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PAGE

Statutes

21 U.S.C. §§ 173 and 174 ..... 1, 20, 22
21 U.S.C. § 176a 3
28 U.S.C. § 1254(1) 1

Federal Rules of Civil Procedure

Rule 20 19

Miscellaneous

Alabama v. Patterson, April 3-9, 1933, transcript of testimony 35

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Cohen, Impeachment of a Defendant-Witness by Prior Conviction, 6 Crim. L. Bull. 26 (January-February 1970) 25

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Procedural Protections of the Criminal Defendant—a Revaluation of the Privilege Against Self Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426 (1964) 25, 26

PAGE

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Small, Flora S.E.U.S. (1st ed.) 461 21

Steyermark, Flora of Missouri, 722 21

Uniform Rules of Evidence, 21 (1942) 27, 31, 33

Uniform Rules of Evidence, Rule 21, 9A U.L.A. 607 (1965) 31

70 Yale L.J. 763 (1961) 24

IN THE

Supreme Court of the United States

October Term, 1969

No.

ROBERT COSTA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert Costa, respectfully prays that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Second Circuit, which affirmed Petitioner's conviction for violating Title 21, §§ 173 and 174 of the U. S. Code, and conspiring with one Melvin Elliott to violate those sections. The Petitioner and the co-defendant, Elliott, were convicted on May 22, 1969 and were sentenced to imprisonment for a term of five (5) years on each count, with a direction that they run concurrently.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1). The Court of Appeals for the Second Circuit rendered its decision affirming the con-

viction on December 15, 1969 and stayed issuance of the mandate on January 12, 1970. Petitioner had been represented by William M. Kunstler, Esq. and Petitioner has advised his present counsel that a stay was obtained by Mr. Kunstler to permit filing of a Petition for Certiorari. (See Appendices A,B,C.)

Questions Presented

1. Whether Petitioner's constitutional rights to confrontation under the Sixth Amendment of the Constitution and rights to a fair trial under the Fifth Amendment were violated by the Trial Court's refusal to compel the revelation of the name of an informer and refusal to even allow a one (1) day adjournment so as to enable Petitioner to locate the informer?

2. Whether Petitioner had "standing" to demand the identity of the informant and to compel his attendance under the Sixth Amendment?

3. Whether the presumption under the statute herein involved (21, U.S.C.A. §§ 173 and 174) that possession alone is sufficient evidence to convict unless the accused supplies an explanation satisfactory to a jury, is in accordance with the Fifth Amendment, especially in view of the ruling of the Trial Court that if Petitioner took the stand prior convictions might be elicited by the Government?

4. Whether it was a denial of a fair trial for the Trial Court to permit cross examination of the Petitioner when he took the stand about a prior unrelated crime, in view of the statute under which he was being tried which required that he give an explanation or else suffer automatic conviction?

5. Whether there was sufficient evidence to warrant a conviction altogether?

6. Whether the mandatory minimum punishment prescribed by the statute (21 U.S.C. 174) is a violation of the Eighth Amendment of the Constitution?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments are involved herein.

Sections 173, 174 and 176a of 21 United States Code are also involved.

Statement of the Case[1]

The Petitioner herein was originally indicted in November, 1967 by a Grand Jury in the Southern District of New York. On February 17, 1969, a superseding indictment was returned by a Grand Jury (presumably a different one) which returned an indictment virtually identical to the original, except that the date of the conspiracy was different.

Statement of Facts

After the various opening statements (TT 5-16), the Government called John Coursey, a former federal narcotics agent, presently employed as director of security by the Motown Record Corporation[2] of Detroit, Michigan (TT 17, 63). Mr. Coursey testified that, at "approximately

[1] All references to the trial transcript shall bear the prefix TT.

[2] Parenthetically, both Mr. Elliott and Mr. Coursey are black men (TT 191, 268).

8:30, 8:40 p.m.'"[3] (TT 17) on August 4, 1967, he had met Melvin Elliott, hereinafter sometimes referred to as Elliott, and "an informant" in "a bar located at 135 52nd Street . . . in the City of New York, Borough of Manhattan" (TT 17).[4] Mr. Coursey, who was introduced to Elliott as "Johnny from Cleveland" (TT 19), told him that "I was interested in buying some heroin and asked him what he had" *(ibid.)*.

At that time, Elliott, after looking around the bar, "said that he thought the place was hot and . . . pointed to one table and said, 'I recognize some of them as policemen'" (TT 20).[5] He then announced that he wanted a drink, arose and "walked to the bar" *(ibid.)*. During Elliott's brief absence, Coursey, scribbled a note stating, in words or substance, that "he knows who you are", and handed it to the informant who then "walked over to the table where some covering agents were sitting and passed the note to them"[6] (TT 20-1). The latter then "left the building and Melvin Elliott came back to the booth where I was and he took his seat again" (TT 21).

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[3] The witness, in testifying before the Grand Jury, had placed the time "at approximately 7:00 p.m. . . ." (TT 85).

[4] Elliott and the informant had arrived "[F]ive or ten minutes" after Coursey had sat down in a booth (TT 69). But, in his report of the incident, the agent stated that, after watching Elliott and the informant "take seats at a table", he had then joined them . . ." (TT 88).

[5] Cf. TT 76-78.

[6] All this time, Elliott was at the bar, "approximately 10, 15 feet" from the table where the agents were sitting.

> Q. If Mr. Elliott had turned around would the agents have been in his line of sight? A. Yes (TT 80-81).

[*It should be noted that many portions of the Government's case are simply beyond belief and contrary to common sense.*]

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Upon his return, Elliott said that "he could obtain heroin for me, three to one cut . . . " *(ibid.)*.[7] The price of an "eighth of a kilogram" (*ibid.*) so adulterated was $3,500.00 *(ibid.)* and of "a half a kilo", $6,000.00 (TT 22). When Coursey stated that he was interested only in the former quantity, Elliott made a telephone call out of earshot of the witness[8] and then informed him that "he could deliver the heroin very shortly and asked me for the money" *(ibid.)*.[9]

When Coursey refused to give Elliott the money before delivery, the latter agreed[10] to have the agent tear each bill in half, with one portion thereof in the possession of each man (TT 24).[11] Elliott had then told Coursey "that he would be back shortly and he would meet me in the informant's room which was in the Americana Hotel" *(ibid.)*.[12] After Elliott had left the bar, the agent "communicated with the Bureau of Narcotics base station" *(ibid.)*.

---

[7] A "three to one cut" means "that for each portion or say for each ounce of heroin you could add three more ounces of an adulterant and make four ounces" (TT 21). However, Coursey had told the Grand Jury that Elliott had only offered him heroin at "a six-to-one cut" (TT 85).

[8] In his Grand Jury testimony, Coursey had not mentioned any such telephone call (TT 97).

[9] According to Elliott, "You got to give me the money because I have to make sure it is not a setup or anything" (TT 22).

[10] After rejecting Coursey's first offer of his ring and his watch (TT 22).

[11] According to Coursey, he had torn each bill, the largest denomination of which was $100.00, in half, on the table, "in open view", giving Elliott his portion and replacing the remainder in his pocket (TT 108-9).

[12] In his Grand Jury testimony, Coursey reversed the sequence as to when the "question of delivery" took place (TT 98-101).

Prior to contacting the base station, however, Coursey and the informant had followed Elliott west on 52nd Street to Seventh Avenue (TT 114). In so doing, they had remained "a couple of steps behind him" (TT 113) as he walked "in a hurry . . . towards Seventh Avenue" (TT 113-14). At the corner of 52nd Street and Seventh Avenue, Elliott had hailed a southbound taxicab, following which Coursey and the informant had returned to "the vicinity of the Americana Hotel" (TT 114-17).[13]

At "approximately 2:15 a.m." (TT 24) the next morning, Coursey and the informant were in "Room 3006 or 3008" at the Americana Hotel (TT 25).[14] Elliott, who had told Coursey that he would return in "approximately an hour"[15] (TT 111), "shortly,"[16] *(ibid.)* and "in about a half hour" (TT 112),[17] had then knocked on the door (TT 122). When the informant, opened the door, Elliott entered the room and, without prearrangement,[18] had headed immediately "for the bathroom" (TT 123). The informant had then opened the door to the bathroom "so that [Coursey] and Mr. Elliott could go into the bathroom" (TT 122).[19]

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[13] In his report, Coursey had noted that "Melvin, the informant and I left the bar and walked west to Seventh Avenue, where Melvin said he would meet us later in the informant's room" (TT 116).

[14] On cross, the room became "either 3206 or 3208" (TT 56). The Grand Jury was told that Elliott and not the informant had registered for the room in question (TT 102).

[15] Before the Grand Jury.

[16] At trial.

[17] In Coursey's memorandum of August 9, 1967.

[18] TT 123.

[19] Q. The informant who had opened the door somehow . . . got to the bathroom door before Mr. Elliott . . . ? A. That is correct (TT 124).

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Although the informant had remained in the hotel room, no attempt was made to shut the bathroom door (TT 124). Elliott then gave Coursey "a brown paper bag . . . [which] contained a glassine envelope which in turn held a white powder" (TT 25).[20] Thereupon, the witness gave Elliott "the rest of the bills . . . except for two" (TT 127). After the latter had counted the halves given to him, he stated that "something is wrong, it is not all here" (TT 26). Coursey had responded by suggesting that they go "where you have the other halves of the bills and we can match them up and make sure everything is correct" *(ibid.)*.

When Elliott had demurred to this suggestion *(ibid.)*, Coursey had recommended that "Maybe you better call" *(ibid.)*. The former had then gone to "a wall telephone in the bathroom" *(ibid.)* and dialed a number. Because Elliott had "dialed it incorrectly" *(ibid.)*, the witness had "told him maybe he should call . . . and find out from information" *(ibid.)*.[21] Elliott had then dialed information "and asked for the Bon Soir Club on 8th Street and . . . called the Bon Soir and asked to speak to a man by the name of Bobby" *(ibid.)*.

Shortly thereafter, Elliott had said, "Hey, Bobby, how many hundreds were there?" (TT 27). He had then stated, "29? Okay" and replaced the receiver *(ibid.)*. Coursey had then "found the other two halves of the bills that I had and he got the correct number of halves of bills to take back" *(ibid.)*. He had then informed Elliott that, in the future, he "couldn't possibly wait that amount of time

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[20] Government Exhibits 4, 5 and 6.

[21] Coursey's suggestion was made as Elliott "started to go for the telephone book . . ." (TT 138).

and . . . wouldn't be able to give him the money in advance and . . . wasn't going to tear the bills in half any more" *(ibid.)*. Elliott agreed that "it wouldn't be necessary because I was now a customer . . . and he could arrange any transaction that I wanted" *(ibid.)*.

After Elliott had told him that he could get "his telephone number from the informant" (TT 27-28), Coursey said, "Since you are here I will get it from you and let me run out and get a pencil and write down your telephone number" (TT 148). He had then left the bathroom, leaving its door open, and conducted a field test "on a portion of the white powder contained in the envelope . . ." (TT 28).[22] This test, which consisted of adding a clear liquid solution[23] to "a portion of the powder" *(ibid.)*, resulted in a change in color "indicating that the powder does contain an opium derivative" *(ibid.)*.[24]

Coursey had then returned to the bathroom where he had written Elliott's telephone number on "a scrap of paper" (TT 150). He had torn up the paper "[A]fter I included the telephone number in my report . . ." *(ibid.)*.[25] Elliott had then left the hotel room after Coursey "told him that I would be in touch with him in the next couple of weeks . . ." (TT 29).[26]

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[22] This field test took place in a foyer, "[N]o more than a couple of steps" away from the open bathroom door (TT 149).

[23] Known as a Marquis reagent (TT 28).

[24] Paul Goldman, a chemist for the Treasury Department, for thirty-four years, testified that the Marquis reagent field test would take "an experienced man . . . [from] one or two minutes" (TT 316).

[25] This number did not appear in the relevant portion of Mr. Coursey's report.

[26] In his report, Coursey had stated that "Melvin said that he would expect a call from me in at least two weeks and then left" (TT 155).

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After Elliott's departure, Coursey had gone "downstairs and . . . met Group Leader Heisig on . . . 52nd Street, and turned the package over to him" (TT 29). The two men had then proceeded to their office where they had "conducted another test, a Mecke test, which is a clear solution added to the powder which will turn it a green color" (TT 30).[27]

Peter Pallatroni, a Federal Narcotics agent, had watched Elliott enter the Americana Hotel at "approximately 2:15 a.m." on August 5, 1967 (TT 163).[28] Thirty minutes later, he had seen appellant leave the hotel through an exit opening on Seventh Avenue (TT 164). After Elliott had entered a taxicab, Pallatroni, in a car driven by fellow agent Ronald J. Rossi, had tailed him to the Bon Soir at 40 West 8th Street, New York, N. Y.

Pallatroni had then followed Elliott into the Bon Soir where, from a vantage point at the bar,[29] he had watched him go to a table (TT 164-5). Shortly thereafter, Elliott was joined by appellant Costa to whom he had handed "a sum of currency" (TT 165). Costa had placed this sum on the table "and examined it thoroughly" *(ibid.)*. After some conversation, which the witness had not overheard, Costa had "counted out a portion of the money from first the lefthand side and held it up, and with his right hand, counted out a portion from the right side" (TT 165).

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[27] As contrasted to a "pink or purplish color" when a Marquis reagent is used (TT 62).

[28] Pallatroni, who had never seen Elliott before, had been furnished with a description of him. In addition, a fellow agent "walked in right behind him and pointed him out" (TT 176).

[29] Some "25 feet" away from the table in question (TT 189).

After placing the money on the table, Costa had "examined it very thoroughly" for "a minute, maybe longer . . . in full view . . . " (TT 200-10). At this time there were "people at other tables" and the band " . . . was packing up . . . " (TT 211). A narcotics agent was sitting at the next table, "very close [to] the table where the counting was taking place" (TT 235).[30]

Following "a few more words of conversation" between the two men, "Elliott got up and left the bar of the Bon Soir Club, walked right past me" (TT 166). Costa had then arisen and gone "to another table and at that table there was a female and I believe one other couple" *(ibid.)*. At "approximately 3:30 that morning", Costa "and a female" left the club, followed by Pallatroni[31] *(ibid.)*.

Group Supervisor Theodore Heisig[32] had received Government Exhibit 6[33] from Agent Coursey "at approximately 2:45 a.m. on August 5, 1967 . . . " (TT 239). He had then taken the exhibit to his office at 90 Church Street, New York, N. Y., where he "conducted a field test for narcotics on a small portion of the white powder contained in the

---

[30] While this activity between appellants was taking place, the witness was standing at the bar "looking directly at them" (TT 206). From his vantage point, he was able to see "all of Mr. Costa's full face" and "almost all of Mr. Elliott's full face" (TT 208). Compare with testimony of Agent Rossi, TT 289, *infra* at p. 12.

[31] Pallatroni had then kept Costa under surveillance as the latter and his female companion went first to Trudy Heller's and then to the Mystique Club (TT 220-21). The surveillance had ended "between 6 and 7 a.m." (TT 166).

[32] Then supervisor of the Second Enforcement Group, Bureau of Narcotics and Dangerous Drugs (TT 238-9).

[33] This exhibit, a brown paper bag, contained Exhibit 4, a glassine package, which was inside of Exhibit 5, a "clear plastic container . . . " (TT 240-1).

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glassine envelope . . . " (TT 241). The witness did not indicate the results of the test he had conducted.[34]

Special Agent Thomas G. Byrne had been on duty "in the vicinity of 52nd Street and Seventh Avenue . . . between the hours of 8:30 p.m. and 9:00 p.m." on August 4, 1967 (TT 250). He had seen Elliott arrive at the Americana in a taxicab, enter the hotel, and in "about 15 minutes . . . [with] an informant leave the hotel and walk to the 52nd Street Bar located on 52nd Street off Seventh Avenue" (TT 251). Some thirty minutes later, Elliott, Coursey and the informant had "left the bar and walked to the corner of 52nd Street and Seventh Avenue where the defendant got into a taxicab which went south on Seventh Avenue to the vicinity of West 8th Street and Sixth Avenue" (TT 252).

There, Elliott had left the taxicab, made a telephone call, and then walked to the Hotel Earl on Waverly Place "where he stood in front . . . for several minutes" *(ibid.)*. From then "until approximately 1:00 a.m. . . . Elliott was observed on several occasions to walk from the Hotel Earl, return to 8th Street and enter the Bon Soir Bar" (TT 253).[35] At 1:00 a.m., Agent Byrne had lost sight of Elliott and "returned to the vicinity of the Americana Hotel, this time on 53rd Street off Seventh Avenue" (TT 254).

He had next seen Elliott at "approximately 2:15" (TT 254) when the latter had returned to the Americana. A half-hour later, he had followed appellant to the Bon Soir

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[34] Later, Paul Goldman, a Treasury Department Chemist, testified that he had determined that the "white powder" was "a mixture of heroin hydrochloride and an adulterant manitol" (TT 312).

[35] The Hotel Earl is "one block south of the Bon Soir" (TT 253).

Club where "Elliott got out of the cab, went into the club, where he remained for about 15 minutes" *(ibid.)*. At that point, surveillance of appellant was "discontinued . . ." *(ibid.)*.

Byrne had arrested both appellants in November of 1967. He had taken Costa into custody at John F. Kennedy International Airport "at approximately 8:40 p.m." on November 2nd when the latter had arrived from Florida (TT 260). The next day "at approximately 3:30 p.m." *(ibid.)* he had arrested Elliott in the vicinity of 72nd Street and Columbus Avenue, New York City" *(ibid.)*.

Former Agent Ronald J. Rossi had driven Agent Pallatroni to the Bon Soir Club "at approximately 2:45" on the morning of August 5 (TT 269). After Rossi had parked the Government vehicle,[36] he had entered the club, gone to the bar and ordered "a bottle of beer . . ." *(ibid.)*.* After obtaining his beer, he had "sat at a table close to Mr. Elliott's table . . ." (TT 270).[37] After the latter had been joined by Costa, Rossi "observed Mr. Elliott hand Mr. Costa a sum of money" *(ibid.)*. Costa had then removed from "his breast pocket a sum of money as well" (TT 271).

Rossi had then overheard Costa ask, "Was there any trouble?" and Elliott reply, "No" (TT 271). Costa had then

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[36] The agents' car had passed Elliott's cab in front of the Bon Soir, "and pulled in the opposite side of the street" some "six feet" away (TT 283).

[37] "[I]t was one table removed and . . . on an angle to Mr. Elliott's and Mr. Costa's table . . . five or six feet away" (TT 285). At this time, appellants were "directly facing" the witness (TT 287).

* [Petitioner contends this is another incredible statement as he maintains that a customer must have had tickets and could not otherwise order from the bar directly.]

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asked, "When would he want more stuff?", to which Elliott answered, "In the future" or "pretty soon" *(ibid.)*. Then Costa had stated, "Okay, I will see you later" *(ibid.)*.

Both men had been "sitting almost side by side" at the table (TT 288). Neither appellant was "facing full face to the bar" but with their profiles "on an angle" thereto (TT 289). After Rossi had watched the comparison of the money he had not seen what happened to the bills.

> Q. You say after the money had been compared, what happened to it as far as you could see? A. To the money?
>
> Q. Yes, where did it go? A. I don't know.
>
> Q. Did there come a time when you no longer saw it? A. Yes, sir.
>
> Q. You didn't see anybody put it in their pocket, did you? A. No, sir.[38]

---

[38] No attempt was made to arrest either appellant at this time when the money, whose serial numbers had been recorded by the Bureau of Narcotics and Dangerous Drugs (TT 49), could have been identified.

POINT I

The petitioner was denied his Sixth Amendment right to confrontation of witnesses and to compel the attendance of witnesses by the trial court's ruling that the Government need not reveal the identity of an informer. To make matters worse, the court also denied a one day adjournment so that petitioner might try to find the informer himself. This naturally also violated the Fifth Amendment right to due process of law because it precluded a fair trial.

The Government produced a witness, John Coursey, who testified that he had met Elliott by arrangement with an informant (TT 17). An immediate objection was interposed and a request was made that the informer be identified (TT 18).

The Court determined, despite the dearth of any substantive objection by the Government, not to compel the divulgence of the name of the informer (TT 44). Counsel for both the Petitioner and the co-defendant indicated that they wanted "to call the informer . . . to investigate him and find out more about him" (TT 43). A whole series of questions directed at the Government's witness, Coursey, were aimed at trying to elicit the name and identity of the informer. In each instance, however, the Court sustained objections and accordingly the name was never divulged (TT 46-47).

It is clear that the identity of the informer might very well have played a very important role in determining what sort of defense to interpose and, of course, in also defending against the allegations and charges of the Government.

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It is of course elementary, that in *Roviaro* v. *United States,* 353 U.S. 53, (1957), the Supreme Court declared that it is essential that the identity of a material-witness informer must be revealed otherwise the Government must incur a dismissal of the charges.

See, United States v. *Augenblick,* (1969) 393 U.S. 348.

In *Velarde-Villarreal* v. *United States* (1965), 354 F. 2d 9 and *United States* v. *Clarke* (1963), 220 F. Supp. 905, 909, the Courts declared that it was essential that the Government engage in a reasonable effort to produce an informer at the trial. In *Augenblick, supra,* it was held an essential Sixth Amendment right.

In *Eleazer* v. *Superior Court* (Supreme Court California, 1/30/70) the highest Court of California ruled that it is essential that an honest effort to locate informers for use at trial must be made [6 Cr. L. 2376].

The California Court noted that the prosecution is responsible for the production of an informer at a trial because, in the first place, it is more likely to have contacts with and know of the location of the informer and, secondly, is in a much better position because of its greater investigatory staff to find the informer.

In the case at Bar, the Government not only did not produce the informer, but objected to revealing his name, or anything else about him. The Court would not even give a one (1) day adjournment to the Petitioner for the purpose of finding the informer. In the *Eleazer* case, supra, the California Supreme Court observed, *inter alia*:

> "What must be disclosed is the witness's 'identity'; not merely his name, but all pertinent information which might assist the defense to locate him . . .

> Thus, although the prosecution need not produce the informer as a witness, it cannot withhold information which might assist the defendant's efforts to locate and produce him." (*Eleazer* v. *Superior Court*, supra, 6 Cr. L. 2376)

In *Brady* v. *Maryland*, 373 U.S. 83, the Supreme Court of the United States clearly noted that the Government must reveal helpful or exculpatory information to a defendant in a criminal case.

In *Nutter* v. *State*, the Maryland Court of Special Appeals (6 Cr. L. 2376, decided February 10, 1970) also declared that under many circumstances the identity of an infomrer must be revealed.

See also:

Commonwealth v. *Carter*, 233 A. 2d 484 (Penna), where the Pennsylvania Supreme Court ruled that it was essential that the Commonwealth reveal the name of an informer, even though, unlike *Roviaro* he was not the "sole eyewitness" to the entire transaction.

Justice Roberts, writing for an unanimous court recognized the potential bias and/or unreliability of cases built by law enforcement officers. Thus, he declared:

> "Elemental to our concept of fairness, as well as that embodied in the Federal Constitution, is the awareness that the testimonial perspective of police officers is conditioned by the 'often competitive enterprise of ferreting out crime'. *Johnson* v. *The United States*, 333 U.S. 10, 14 . . . This awareness makes us reluctant to permit the establishment of facts crucial to criminal guilt solely by police testimony based on a single observation where testimony from a more disinterested source is available. Thus, while dis-

> closure might not be necessary in a case where police evidence as to crucial facts was corroborated by neutral witnesses, we are unwilling to do so in a case like the instant one." (At 288)

The Court further recognized that the mere fact that the case happened to be one involving narcotics was no basis for denying fair-trial safeguards to such defendants.

In *United States* v. *Day* (3d Cir.), 384 F. 2d, 464 (1967), the factual situation was exteremely similar to that involved here. As the Court described it:

> "A federal narcotics agent testified that accompanied by an informer he approached a group at a street corner in Pittsburg, Pa. and asked one of the persons standing there if there were any narcotics in the area. Shortly thereafter, the defendant came out of a bar and joined the informer and the agent. The agent was introduced to the defendant by the informer who said 'this is John, a friend of mine.' Immediately after the introduction the defendant asked the agent and the informer if they were looking for narcotics. The agent said they were and the defendant stated that 'he only had one bag at this time'. He stated that he was looking for his supply man to come. The agent purchased one bag of heroin at this time. Shortly thereafter on the same day, he brought a second bag of heroin from the defendant. Another agent observed the scenes which have been described and corroborated the testimony of the purchasing agent to the extent he was physically able to do so." (At 464-5).

In the *Day* case, the Third Circuit found that the informer's identity had been known to the defendant from the moment the transaction began.

In *Smith* v. *Illinois*, 390 U.S. 129, the Supreme Court revealed that it was error not to reveal the name and address of an informer since this deprived the defendant of a Sixth Amendment Right of Confrontation.

See also:

Alford v. *United States*, 282 U.S. 267; *Fontaine* v. *California*, 390 U.S. 593, 596.

The case of *Alderman* v. *United States*, 394 U.S. 165 (1969) indicates that where information is available to the prosecutor which is being used directly or indirectly against a defendant, it is the defendant's right to know this information, and it is for the accused to determine whether or not it may be helpful. The Court cannot, *ex parte*, determine that it is unnecessary to reveal this information to a defendant. If *Alderman* stands for anything, it reveals that the defendant himself must ultimately determine whether or not the information is useful and not the Government or the Court. The distorted view or out-of-focus view that the Court or prosecutor may have may cause them to believe the information is not essential. From the accused's point of view, it may be extermely essential.

In *Smith* v. *Illinois*, *supra*, 390 U.S. at 131, the Court observed:

> "The witnesses' (names) . . . addresses open countless avenues of in-court and out-of-court investigation. To forbid this most rudimentary inquiry as a threshhold is effectively to emasculate the right of cross examination itself."

See also:

Alford v. *United States*, *supra*.
United States v. *Augenblick*, *supra*.

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POINT I-A

Petitioner Costa has sufficient standing to seek (1) the identity of the informant, and (2) his appearance at the trial.

The Circuit Court assumed the trial court erred in refusing to compel the identity of the informer. Thus the Court noted (slip opinion p. 732): [page 45 infra]

> "If the informer played a sufficiently substantial role for Elliott to be entitled to have his identity revealed, Costa, who was on trial for the same substantive offense arising out of the same transaction, was equally entitled to the information even though the informer had not seen him."

But the Court should have reversed since the petitioner never did have a chance to even interview the informer, even after his alleged identity was discovered a day before the summations. Thus the question of "*standing*" seems clear in favor of Costa.

Under rule 20 of the Federal Rules of Civil Procedure, anyone adversely affected by the outcome of civil or criminal litigation has sufficient standing to question any aspect thereof.

See *United States* v. *Agucci*, 310 F. 2d 817, 828, Cert. Den. Sub. Nom. *Giuppone* v. *United States*, 372 U.S. 959.

POINT II

The statutes 21 U.S.C. 173 and 174 in essence create a presumption of guilt. This violated the petitioner's rights against self incrimination.

It is of course recognized that *Leary* v. *United States,* 395 U.S. 6 (1969) has been distinguished in *Minor* v. *United States* and *Buie* v. *United States,* 38 USLW 4019, wherein the Supreme Court of the United States indicated the interpretation of laws may be different with respect to heroin and marijuana. Anomalously, the Supreme Court ruled in *Turner* v. *United States,* 38 USLW 4103 (January 20, 1970) that with respect to items such as cocaine, a reversal was required, but not in case of heroin.

It is respectfully submitted that this Court has been inconsistent in its application of the Rules laid down in *Leary* v. *United States,* supra, and that the matter should be resolved. There does not appear to be any sound reason to believe that with respect to certain narcotic drugs an individual cannot be incriminated, and yet, with another, he may be.

In *Marchetti* v. *United States,* 390 U.S. 39 and that series of cases, the Supreme Court of the United States also revealed that presumptions of guilt were an unconstitutional conflict with the Fifth Amendment and such statutes in themselves should be struck down.*

More confusion is added by the recent cases of *Bryson* v. *United States,* 396 U.S. , 90 S. Ct. 355 (1969) and *United States* v. *Knox,* 396 U.S. , 90 S. Ct. 363 (1969) which indicated that the defense of self incrimination might be a bar to any prosecution.

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* The requirement of a minimum sentence appears to be in conflict with the 8th Amendment as constituting cruel and unusual punishment.

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In *United States* v. *McCarthy*, 298 F. Supp. 5561 (S.D.N.Y. 1969) District Judge Frankel pointed out that Congressional statutes requiring incriminatory reporting were in conflict with the Fifth Amendment. He cited with approval, this Court's pronouncement in such cases as *Marchetti* v. *United States, supra.*

It is therefore submitted that the Rule which was enunciated in *Leary* v. *United States,* and apparently attenuated to some extent, in *Minor* and *Buie,* should be reanalyzed so that a consistent interpretation should be forthcoming.

Cf. *Young* v. *Florida,* 203 So. 2d 650 (1967); *State* v. *Nabes,* 28 Conn. 28, 248 A. 2d 242, 243; and *Stump* v. *Bennett,* 398 F2d 111, 120.

The Court was specifically requested to charge that there was no evidence before the jury that heroin was not indigenous to the United States (TT 363).*

Moreover, it appears that the observations of this Court, that heroin is not readily found in the United States, but can ordinarily only be imported does not appear to be consistent with the evidence available.**

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* In this connection, see the refusal of the trial judge to add the phrase "if there is evidence before you that heroin is not indigenous to the United States" (TT 363). Heroin hydrochloride. or diacetylmorphine hydrochloride, its more correct nomenclature (see *The Merck Index,* Merck & Co., Inc., Rahway, N.J., 1952, 6th Edition, at 318, is readily made from morphine (*ibid.*) which itself was synthesized in 1952 by Dr. Marshall Gales, Professor of Chemistry, University of Rochester. See *Journal of the American Chemical Society,* Vol. 74, p. 1109, 1952 (preliminary communication) and Vol. 78, pp. 1380-1393, 1956 (full paper). Accordingly, since heroin can be made in the United States from materials readily available here, it is not reasonable to "presume" that all found here must invariably have been imported from abroad. In addition, the opium poppy (botanical name *papaver somniferum*), the natural source of morphine, is grown in the United States and, more specifically, in the State of Washington, where it is fairly common. In this connection, see Small, *Flora S.E.U.S.* (1st ed.) 461; Steyermark, *Flora of Missouri,* 722; and Gleason, *Flora* 2:198.

** It is respectfully submitted that this Court may have erred in *Minor* and *Buie.* The maxim *Errare Humanum Est* may even apply to this august tribunal.

POINT III

The petitioner was extremely predjudiced by the trial court's refusal to preclude the prosecutor from adducing evidence of prior convictions when Costa took the stand in his own defense. Since the statutes, 21 U.S.C. 173, 174, requires an explanation if the automatic presumption of guilt is not to be raised, it is clear that a person accused under the statutes must be permitted to testify and that tesimony should not be discouraged or weakened by the introduction of unconnected or extraneous evidence that the defendant has previously been convicted of a crime not germaine to this prosecution.

The trial court however refused to restrict the prosecutor in pursuing this line of cross examination, and, consequently, petitioner was severely prejudiced. The rule with respect to cross examination about disconnected or irrelevant prior convictions ought to be that such evidence may not be introduced unless the prosecutor can convince the trial court that its introduction is essential.

In the case at Bar, the statute under which Petitioner was indicted raised an almost automatic presumption of guilt unless the accused was able to come forward with some explanation. Such a rule which is unusual in a criminal case, almost requires that the defendant take the stand in his own defense. If he does so, however, he is confronted by the dilemma that if he has been convicted of any prior crime, that fact can be introduced into evidence on cross examination by the prosecutor. Such a rule, of course, discourages a defendant with a prior record, even if it is irrelevant to the present prosecution, from taking the stand. In the case at

Bar, Costa had a prior record for counterfeiting of which he had been convicted at the age of 20. (TT 320-322).

Trial Counsel was very careful to preserve objections to the extent that this was not a prior crime for "perjury", and that is was unnecessary and irrelevant to bring it up. A careful record was preserved. Thus, the colloquy was as follows:

> "Mr. Kunstler: I am moving that in the event the defendant Costa takes the stand in his own behalf that there be no questions by the Government with reference to any criminal record, other than those crimes which directly relate to credibility such as the crime of perjury, and that counterfeiting is not such a crime . . .
>
> The Court: Have you any authorities for that position?
>
> Mr. Kunstler: *No, your Honor, I have none except that I am hoping that possibly maybe this case will be the authority some day for it . . .*
>
> Mr. Sterling Johnson: If the defendant takes the stand, your Honor, and assumes the role of a witness, he must also be subject to the rules concerning cross examination, and the Government intends to cross examine the defendant with respect to any conviction that he has.
>
> Mr. Kunstler: It is fundamentally obvious, your Honor, that the rule as it stands is wrong.
>
> The Court: That may be. In fact it might be a matter of policy that no defendant who takes the should be cross examined about any prior conviction. I am not stating what I think about it, but that could be. But that doesn't seem to be the law at the present time and I think Mr. Johnson is right and I am forced to deny your motion.

It is respectfully submitted that this Court should change the rule, particularly in a case such as the one herein involved where it is almost essential that the accused testify in order to furnish an explanation if one exists against the conclusive presumption of guilt which would otherwise obtain, a deterrent or detriment of bringing up a disconnected prior conviction should not only be discouraged but should be forbidden. At the very least, it should be restricted to cases where fundamental justice requires that it be introduced.*

According to the colloquy among defense counsel, the prosecutor and the Court, it seems that the Government intended to introduce this evidence for no particular reason except because the Rules permitted him to do so.

The theory behind the introduction of such evidence is to better equip the jury to determine the defendant's credibility. In practice, however, it is the effect of suggesting to the jury that the defendant has a "criminal propensity" and probably committed the crime for which he is on trial as well. (See "Note, Other Crimes Evidence at Trial: of Balancing and Other Matters" 70 Yale L.J. 763 (1961)).

Justice Holmes in *Gertz* v. *Fitchburg Ry. Co.*, 137 Mass. 77 (1884) indicated the Rule was questionable at best, stating:

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* The Court and counsel were all unaware of *United States* v. *Palumbo*, 401 F. 2d 270, 272-3 (2 Cir. 1968) cert. denied, 394 U.S. 947 (1969) which held that a trial judge does have power, in the exercise of discretion, to make advance rulings prohibiting the use of prior convictions for impeachment under certain circumstances.

Nevertheless, the Court of Appeals should have reversed Costa's case, and not prejudice his rights because of mutual errors of the parties' attorneys and the Court.

". . . When it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the *general readiness to do evil* which the conviction is supposed to show. It is from this general disposition *alone* that the jury is asked to infer a readiness to lie in the particular case, and thence that he lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he perjured himself and it reaches the conclusion solely through the general proposition that he is a bad character and unworthy of belief." (Emphasis ours)

See also:

Ladd Credibility Tests—Current Trends 89 U. Pa. L. Rev. 1660 (1940).

See also:

Cohen, Impeachment of a Defendant-Witness by Prior Conviction, 6 Crim. L. Bull. 26 (January-February 1970);

Note:

Procedural Protections of the Criminal Defendant-a Reevaluation of the Privilege Against Self Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 73 Harv. L. Rev. 426, 440-442 (1964).

In his dissent in *Spencer* v. *Texas,* 385 U.S. 554 (1967) Chief Justice Warren noted that the introduction of prior convictions needlessly prejudiced the accused without advancing any legitimate interest of the State (385 U.S. at 561-564).

In the *Spencer* case it noted that 31 states have abandoned the common law recidivist procedure, apparently premised in the belief in its essential unfairness.

It can of course be argued that the accused can simply avoid the problem by not taking the stand. Even in an ordinary criminal prosecution this is a heavy price to pay and it seriously begs the problem.

In a case such as the one herein, however, where an explanation must be given otherwise guilt is virtually presumed, the Rule is even more prejudicial.

In 78 Harv. L. Rev. *supra* at 442, it is noted:

> "The impeachment rules cannot be justified by the defendant's freedom to keep out the damaging evidence by staying off the stand, for that freedom is limited to his desire to prove his innocence as well as by the inference that is likely to arise from failure to testify. By threatening defendants with the introduction of prejudicial evidence, these rules create the danger of unjust convictions either directly through the effect of such evidence on the jury, or indirectly by keeping the defendant off the stand. If the premises of the rule excluding propensity evidence are accepted, then admission of any evidence of prior misconduct, regardless of its relevance to the propensities to commit the crime charged or to defendant's credibility, will probably prejudice the accused and so induce even the innocent to stay off the stand. Moreover, present impeachment rules allow for the introduction of prior criminal conduct and data directly relevant neither to propensity nor to credibility, and consequently can only be unfairly prejudicial. Indeed most defendants who stay off the stand apparently do so not out of a dread of self

incrimination or perjury, but rather for fear of the effect on the jury of their prior record."

In *Estes* v. *Texas,* 381 U.S. 532 (1965) it is clear that the "probability of prejudice" based upon all the circumstances is the emphasis which this Court is giving to the problem of prejudice generally (381 U.S. at 544).

In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), this Court created a rule of thumb that the cure for an eradication of prejudice "lie in those remedial measures that will prevent the prejudice *at its inception.*"

See also:

Uniform Rules of Evidence, 21 (1942); *Model Code of Evidence,* Rule 106 (3)

In 1954, *McCormick* in his Hornbook on Evidence noted:

"A defendant who's considering whether or not to testify in his own behalf may want, if possible to know to what extent the trial judge will permit him to be impeached by his past record. Although a trial judge cannot be expected to give preliminary rulings which will foreclose him completely as the trial progresses, it would appear that the careful exploration of such a request outside the presence of the jury would be in order" (McCormick at p. 94).

In 1965 the United States Court of Appeals for the District of Columbia, in *Luck* v. *United States,* 348 F. 2d 763 adopted McCormick's recommendation. The *Luck* decision declared:

"No person shall be incompetent to testify in either Civil or Criminal proceedings by reason of his

having been convicted of a crime, but such fact *may* be given in evidence to affect his credibility as a witness."

In *Gordon* v. *United States,* 383 F. 2d 936 (1967) the District of Columbia Circuit pointed out certain criteria which might be borne in mind in determining whether or not to permit cross examination as to prior crimes. The nature of the crime whether it is one involving "bad character" or "short temper" may be important. The nearness or remoteness of the prior conviction may also be a factor of great importance.

For example, someone accused of stealing many years before the trial, should not have that fact brought out necessarily at a trial if he has lead an exemplary life since that time. Nor should even a recent crime, not affecting credibilitiy as such be referred to.

In an opinion authored by then Circuit Justice, now Supreme Court Chief Justice, Warren E. Burger, the D.C. Circuit affirmed the defendant's conviction on the basis he had failed to "present the issue to the trial judge in the manner contemplated by *Luck.*" The court, however, felt it necessary to add some further observations on its now five year old *Luck* decision. Justice Burger first reiterated the basic rationale of the "*Luck* doctrine" and pointed out:

> "The impact of criminal convictions will often be damaging to an accused and it is admittedly difficult to restrict its impact, by cautionary instructions, to the issue of credibility." Justice Burger then set forth some guidelines for the trial judge's exercise of discretion in excluding or admitting a prior conviction for the purposes of impeachment.

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"In considering how the District Court is to exercise the discretionary power we granted, we must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a 'bad' person rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category. The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.

"A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime

> to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity."
>
> "Of course, there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case. One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment." 383 F. 2d 936, 940.

In *Evans* v. *United States*, 397 F. 2d 675 (D.C. Cir. 1968) another opinion authored by Justice Burger, the court further clarified the *Luck* doctrine by holding that the above stated tests "are relevant only after (a) threshold burden of demonstrating the peculiar need for the defendant's testimony has been met." In affirming defendant's conviction "(b)ecause he did not make any affirmative showing of why there was a special need for (his) testimony" to the trial judge, Justice Burger pointed out:

> "The defense must show how and why this case calls for a discretionary 'exemption' from the impeachment permitted by statute. Nor, by the same token, will merely stating that it is important for the defendant to testify be sufficient to meet this burden." 397 F. 2d 675, 679.

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In developing the *Luck* doctrine the D.C. Circuit relied heavily on the Model Code of Evidence and the Uniform Rules of Evidence. Both the Model Code (A.L.I. Model Code of Evidence, Rule 106, (1942)) and the Uniform Rules (Uniform Rules of Evidence, Rule 21, 9A U.L.A. 607 (1965)) limit the use of prior convictions to impeach a defendant's credibility in two ways: First, they allow impeachment of credibility only by convictions for crimes involving "dishonesty or false statement." Second, both further limit the use of such convictions by providing that they may be introduced against an accused only if he first introduces evidence solely for the purpose of supporting his own credibilitiy. In *Luck* the court also noted Professor McCormick's suggestion that, "(o)n balance it seems that to permit . . . one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane and expedient solution. . . ." McCormick, Evidence 94 (1954).

Most jurisdictions do not have a *Luck* type doctrine and some, e.g. New Jersey, *State* v. *Hawthorne,* 228 A. 2d 682 (N.J. 1967) have specifically rejected it. However, a few jurisdictions have adopted doctrines, similar to *Luck,* which afford a trial judge discretion to limit the use of prior convictions to impeach a defendant's credibility:

Second Circuit. In *United States* v. *Palumbo,* 401 F. 2d 270 (2nd Cir. 1968) the Second Circuit Court of Appeals, although affirming the defendant's conviction rejected a government argument "that the trial judge has no discretion to exclude evidence of prior convictions for felonies or crimes involving moral turpitude offered to impeach an accused."

> "(W)e hold that a trial judge may prevent such use, if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly." 401 F. 2d 270, 273.*

FOURTH CIRCUIT. A statement in *United States* v. *Hilbreth*, 387 F. 2d 328 (4th Cir. 1967) suggests the Fourth Circuit has also adopted a doctrine similar to that announced in *Luck*:

> There are times, of course, when the court may impose limits on the cross-examination of a witness, especially a defendant, when there is reason to apprehend that the prejudicial effect of the earlier convictions sought to be adduced will outweigh their possible probative force in impeaching credibility. This may be the case, for example, when the prior conviction is remote in time, too near the substance of the alleged crime for which the defendant is currently being tried, or involves no element of mendacity or deceitfulness." 387 F. 2d 328, 329.

SEVENTH CIRCUIT. In *United States* v. *Sternback*, 402 F. 2d 353 (7th Cir. 1968) the Seventh Circuit Court of Appeals ruled that the defendant's failure to obtain a definitive ruling as to whether a 25 year old narcotics felony conviction could be used to impeach his credibility put him "in no position to contend that he was prevented from testifying in his own behalf by an erroneous ruling." The Court did, however, point out: "We think the district court could

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* Unfortunately, the Court and all counsel were unaware of *Palumbo*. This should not penalize petition, especially since the Trial Court seemed sympathetic but felt powerless to help.

properly have excluded the conviction as too remote, if in his discretion he found that under the circumstances it lacked probative value." 402 F. 2d 353, 356

KANSAS. Kansas has adopted Rule 21 of the Uniform Rules of Evidence (discussed above) Kan. Stat. Ann. Section 60-421, and has strictly construed this statute, *State* v. *Motley*, 199 Kan. 335, 430 P. 2d 264 (1967).

NEW MEXICO. In *State* v. *Coca*, 80 N.M. 95, 451 P. 2d 999 (1969) the New Mexico Court of Appeals in reversing defendant's conviction on the ground that the trial court abused and failed to exercise its discretion when it allowed the prosecution to cross-examine the defendant concerning 33 prior convictions ranging from drunkeness to aggravated assault pointed out:

> "The only purpose of such cross-examination is to test the witness's credibility. We have long realized its tendency to prejudice the defendant. Because of this tendency it is the trial court's responsibility to determine when cross-examination should be limited because the legitimate probative value on the credibility of the accused is outweighed by its illegitimate tendency, effect or purpose to prejudice him." 451 P. 2d 999, 1001.

PENNSYLVANIA. Title 19, Purdon's Penn. Stat. Ann., Section 711 (1964) provides that evidence of prior convictions may be admitted for the purpose of impeaching a defendant's credibility only if the defendant first introduces "evidence tending to prove his own good character or reputation" or if he testifies at a trial against a co-defendant charged with the same offense.

The United States Supreme Court has seemingly placed one restriction upon the use of prior convictions to impeach

a defendant's credibility. In *Burgett* v. *Texas,* 389 U.S. 109 (1967) the Court said:

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either *to support guilt* or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. 109, 115. (Emphasis added.)

However, Justice Walter V. Schaefer of the Illinois Supreme Court has suggested the Due Process Clause imposes a much broader restriction:

> "When the accused takes the stand in his own behalf he should be subject to impeachment only by proof of past crimes which directly bear on testimonial deception, such as perjury. Past convictions not in this category should not be admissible unless they are relevant for some purpose other than impeachment. The contrary practice lies close to the borders of due process, and should be eliminated." Schaefer *The Suspect and Society,* p. 68 (NWU Press 1967).

It is therefore submitted that this Court should use this case as a vehicle to fix a definite rule with respect to adducing evidence of prior convictions of one who testifies particularly in a case where his testimony is almost essential.

POINT IV

The evidence adduced at trial was so contradictory and so conflicting that the court should not have even submitted the case to the jury. While the foregoing points are in themselves sufficient to warrant granting certiorari the record should be looked upon in this light, especially since the name of the informant was withheld.

At the close of the Government's case, it was obvious that the nature of its proof was such that the jury should not have been permitted even to speculate about petitioner's guilt. It is one thing to present a story that, while essentially improbable, is at least open to a reasonable inference, depending on the degree of credibility of the Government witnesses, that it actually might have occurred. It is quite another to advance one that no reasonable person can believe could possible have taken place.[39]

The three-act drama constructed by the Government is in the latter category. Tested in the light of "its reasonable relation to the circumstances of life as we know them," *Tot* v. *United States*, 319 U.S. 463, 467, it is simply too "strained" to be gauged in the crucible of jury deliberations. Otherwise, the jury system, particularly in the inflammatory area of serious narcotics cases, will have metamorphosed

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[39] In the latter connection, see Judge James E. Horton's celebrated opinion setting aside the guilty verdicts in *Alabama* v. *Patterson*. After reviewing the testimony of the principal prosecutrix as to the alleged rape of two white women by twelve black youths at high noon on a bright and clear day on top of a slowly moving freight train passing through six towns in a Deep South county, he held that "the natural inclination of any thinking person would be to doubt such a story." Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State University Press, 1969) 268. See also *The Scottsboro Case: Opinion of Judge James E. Horton* (New York: Scottsboro Defense Committee, 1936) 7-8; *Alabama* v. *Patterson*, April 3-9, 1933, transcript of testimony; and Patterson and Conrad, *Scottsboro Boy* (Garden City: Doubleday & Company, 1950) 260-8.

into a wholly inaccurate and unfair barometer of alleged weird and bizarre plots in the field of criminal law.[40]

Just a few examples, taken from the testimony below,[41] will suffice to illustrate the totally incredible nature of the Government's proof.

A. Act I—The 52nd Street Bar

Agent Coursey, with no appreciable preliminaries, in an open booth in a New York City bar on a Friday evening, informed Elliott, whom he had never met before, that he was in the market for heroin. When Elliott stated that he recognized some men at a nearby table as narcotics agents, Coursey took advantage of the former's highly convenient trip to the bar, to write and send a note of warning,[42] via the informer, to the agents, who then promptly beat a hasty retreat.

Elliott, apparently completely oblivious to the note incident, then returned to the booth where he immediately resumed his heroin negotiations.[43] When price and availability had been determined, Agent Coursey then suggested, in order to protect his investment, tearing $3,500 in currency in half, giving Elliott one portion of each bill and retaining the other. The tearing of the bills, the largest denomination of which was $100.00, took place on the booth table, in full view of anyone in the bar who cared to watch the hardly usual occurrence.

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[40] It is to open the door to the presentation of "irrational" evidence to jurors. *United States* v. *Gainey*, 380 U.S. 63; *United States* v. *Romano*, 382 U.S. 136; *Tot* v. *United States*, *supra*.

[41] Appropriate transcript references will be found in the Statement of Facts.

[42] A sign or whisper would seem to have been far safer than the writing and delivery of a note.

[43] Apparently, the departure of the covering agents was not noticed by him.

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B. Act II—A Room at the Americana Hotel

Elliott knocked at the door and, as soon as it was opened by the informant, headed, without prearrangement, for the bathroom. The informant managed to beat him to the bathroom door, which he then opened in time to permit Elliott and Coursey to enter. With the bathroom door remaining open, the two men then exchanged the heroin, contained in three bags, one inside the other, for the halves of the $3,500.00 in Coursey's possession.

Coursey, however, deliberately withheld two bills (which turned out to be $100.00 each). When Elliott counted the halves which the agent had given him, he discovered that they were short. Instead of being able to compute the amount of the shortage himself by merely subtracting the sum of the bills which Coursey had given him from $3,500.00, he felt compelled to telephone "Bobby", his confederate, to ascertain the amount of the halves in the latter's possession.[44]

Coursey had initially suggested that he and Elliott go to where the confederate was in order to settle the question of the missing bills, but the latter insisted on using the telephone in the bathroom. He first dialed the wrong number and was deterred from looking it up in the telephone book by the agent's suggestion that he call Information for the correct one. This, of course, provided Coursey with the name of the Bon Soir Bar.

Coursey then asked Elliott for his telephone number for future business contacts, but was informed by him that he could obtain it from the informant. Nevertheless, the agent insisted on getting it from Elliott himself and

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[44] That there was no need to call "Bobby" is obvious from Coursey's testimony:

> Q. He [Elliott] said something is wrong and he counted what he had and it came to 3,300, is that correct? A. That is correct (TT 137).

left the bathroom on the pretext of finding a pencil. Elliott docilely remained in the bathroom—although there was no longer any need for so doing[45]—while Coursey conducted a field test on the heroin directly outside the open door. Just why such a test had to be conducted while Elliott was still on the premises is completely incomprehensible,[46] but Coursey apparently opened the three containers, extracted a quantity of heroin, took out his field equipment, performed the Marquis reagent test, replaced his equipment, and re-packed the heroin without being discovered by Elliott.

C. Act III—The Bon Soir Club

With one agent watching from the bar of Bon Soir and another seated at a table "five or six feet away" (TT 285), Elliott and Coursey, again in full view in a highly public place, matched up the $3,500.00 in torn bills and then divided the spoils. Then the two men engaged in a highly incriminating conversation which was conducted in loud enough voice to be clearly heard by the seated agent. Finally, although the serial numbers of the currency had been recorded, no attempt was made to arrest either man at a time when there would have been proof positive of their criminality.[47]

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[45] With the informant present all during the negotiations at the 52nd Street Bar, including the bill-tearing episode, it is difficult to understand why the bathroom fillip was necessary in the first place.

[46] Particularly when Supervisor Heisig would shortly conduct such a test himself (TT 30, 241).

[47] In fact, they were not arrested until three months later. The improbability of these events raise serious doubts of the verity of the agents' testimony.

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D. Epilogue

The three acts of this incredible drama amply reveal that, as a matter of law, there is a reasonable doubt as to appellants' guilt. Under such circumstances, there is a duty on the part of a trial judge either to direct a verdict in favor of a defendant or to grant a motion for acquittal.

Any other course is to invite the rankest of speculation by jurors understandably concerned with and stampeded by the danger to society of the trafficker in narcotics.[48]

A motion in arrest of judgment was made and denied.

CONCLUSION

The petition for certiorari should be granted and the judgment reversed.

Respectfully submitted,

IRVING ANOLIK, ESQ.
Attorney for Petitioner

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[48] Although not directly in point, the Supreme Court's "controlling" test for determining the validity of a statutory presumption "that there be a rational connection between the facts proved and the fact presumed", *Tot* v. *United States*, 319 U.S. 463, 467, has some relevancy. The language of the Court, particularly as it relates "to the circumstances of life as we know them" *(ibid.)* is highly applicable here. The Court's ruling in *Tot* was as follows:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be rested upon a view of relation broader than a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts" (at 467-468).

APPENDIX A

Opinion of Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 235, 236—September Term, 1969.

(Argued November 5, 1969 Decided December 15, 1969.)

Docket Nos. 33760, 33814

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT COSTA and MELVIN ELLIOTT,

Appellants.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge,* convicting defendants, after a verdict, of selling heroin to a federal narcotics agent in violation of 21 U.S.C. §§173 and 174 and of conspiring to do so. Affirmed.

FRIENDLY, *Circuit Judge:*

Elliott and Costa appeal from their conviction, after trial before Judge Levet and a jury in the District Court for the Southern District of New York, of selling 81.5 grams of

heroin to federal narcotics agent Coursey in violation of 21 U.S.C. §§173 and 174, and of conspiring to do so.

The testimony of Coursey and of other agents, which has its bizarre aspects, was as follows: About 8:30 P.M. on August 4, 1967, an informant introduced Coursey to Elliott at a bar on West 52nd Street in New York City. Elliott offered to sell ⅛ of a kilogram of heroin for $3,500. Coursey agreed but Elliott demanded cash on the barrelhead. Coursey, exceedingly well equipped with funds, countered with a proposal to take $3,500 in bills, tear each in half, give one part to Elliott, and retain the other pending delivery of the heroin. Elliott accepted, the surgery was performed in the bar then and there, and Elliott agreed to deliver the heroin to the informant's room at the Americana Hotel.

Elliott, under surveillance by other agents, took a taxi to Greenwich Village. Around 1 A.M. an agent observed him between the Hotel Earl and the Bon Soir night club on West 8th St. At 2:15 A.M. three agents saw him enter the Americana. Elliott came to the informant's room and went with Coursey into the bathroom, the informant remaining outside. Elliott delivered the narcotics and Coursey tendered $3,300 in torn bills, retaining the halves of two $100 bills. Elliott counted the bills and, hardly to Coursey's surprise, said that two $100 bills were missing. Coursey assured him that his arithmetic was in error; instead of verifying Elliott's count, Coursey persuaded him to telephone the person, presumably the supplier of the heroin, who had the other halves. When the compliant Elliott had the bad luck to dial the wrong number and started for the telephone directory, Coursey helpfully suggested he call

information instead. Elliott requested the number of the Bon Soir night club, asked for "Bobby" (defendant Costa's first name), and inquired—and apparently learned—how many $100 bills there were. Coursey then produced the two missing halves, asked for Elliott's telephone number, and went out into the hotel room ostensibly to get a pencil and paper. While Elliott obligingly remained in the bathroom, Coursey conducted a field test with positive results.

Elliott left and was followed by other agents to the Bon Soir. He took a table where Costa joined him. In plain view of the agents and, we suppose, of others, Elliott gave Costa the stack of torn bills and Costa took a similar stack from his breast pocket. Then he compared and counted the two piles, and gave Elliott part of the money. Costa asked if there had been any trouble. On getting a negative response he asked when the buyer would "want more stuff." Elliott responded "in the future." A Government chemist testified that the powder received from Elliott weighed 81.5 grams—considerably less than the promised ⅛ kilo—and was 61.5% heroin hydrochloride. There was no evidence that the torn bills were ever traced.

As soon as Coursey used the word "informant," Elliott's counsel objected to any further testimony unless the informant's identity was disclosed. The Court deferred ruling, and the direct examination was concluded. At the end of this the judge took up the question of divulging the informant's name. The Government objected on the ground that the informant had played no substantial role, and the further ground that Costa had no standing to raise the issue, a position irrelevant with respect to Elliott and er-

roneous with respect to Costa.[1] Defense counsel were equally unhelpful to the court. When asked about the necessity for disclosure, Elliott's attorney referred generally to the Sixth Amendment's requirement of confrontation, and Costa's said only that he would like "to investigate him and find out more about him" since "he might give conflicting testimony for all I know." The court declined to order divulgence.

By the afternoon of the second day of trial, a Tuesday, the cloak of secrecy about the informant disappeared. Defense counsel had obtained the reservations and room records of the Hotel Americana, and found the name of the informant and his provenance of Cleveland, Ohio. Elliott's counsel, after unsuccessfully demanding that the Government produce him, sought a continuance until Thursday. Counsel was unable to state what the informant would testify, but said he would like to ask what happened in the hotel room. The Government opposed any adjournment, the court directed the defense to present its case, and, there being none, adjourned the trial until Thursday for summations and charge.

The issue here is not, as in *Roviaro* v. *United States*, 353 U.S. 53 (1957), and many other cases that have been cited to us, the extent of the Government's obligation to divulge the identity of an informer. Here the defense found

[1] If the informer played a sufficiently substantial role for Elliott to be entitled to have his identity revealed, Costa, who was on trial for the same substantive offense arising out of the same transaction, was equally entitled to the information even though the informer had not seen him.

it out only a day after the Government's refusal.[2] The question thus is simply whether the judge abused his discretion in denying a continuance for the presentation of the defense case. We think not. The conduct of defense counsel before, during, and after trial indicates that they were more interested in preserving a point for appeal than in the off chance that the informer's testimony would help them. As a result of disclosure in the Government's bill of particulars, the defense had been in a position for six months to seek the information from the Hotel Americana, or, if this was not successful, to subpoena the records for the trial. While defense counsel may have supposed, as the Government represents it did, see fn. 2, that the informant would not have registered under his true name, if they were seriously interested in locating him it would not have been difficult to pursue the lead the bill of particulars had disclosed. Furthermore, as matters worked out, the trial was adjourned for a day, and we cannot believe that if at the opening of court on Thursday defense counsel had made an offer that the informant would give important proof, the judge would have refused to allow them to present it. Neither was there any post-verdict motion alleging that the informant could have offered any testimony "relevant and helpful to the defense," *Roviaro* v. *United States, supra,* 353 U.S. at 60-61. Mere speculation that the informant might have said the whole episode never occurred is not

[2] When we inquired at argument what public policy was served by the Government's refusing to disclose a name the defendants were thus bound to ascertain, counsel represented that the Government had had no reason to believe the informant had registered under his correct name. But for this representation we would have been tempted to reverse these convictions; a prosecutor should not place needless and pointless road-blocks in the path of the defense.

enough, especially in the face of the corroboration of Coursey by the three agents who saw Elliott enter the Americanna and the two who witnessed the money-counting at the Bon Soir.

Appellants' other main point is this: After the close of the prosecution's case, counsel for Costa moved "that in the event that the defendant Costa takes the stand in his own behalf that there be no questions by the Government with reference to any criminal record, other than those crimes which directly relate to credibility, such as the crime of perjury and that counterfeiting is not such a crime." When the judge asked whether counsel had any authorities for that position, he said he had none. The prosecutor took the unqualified position that if Costa went on the stand, "he must also be subject to the rules concerning cross-examination and the Government intends to cross-examine the defendant with respect to any conviction he has." After expressing some sympathy with defense counsel's position as a matter of policy, the judge said the law forced him to deny the motion.

It does scant credit to Costa's counsel or, for that matter, to the prosecutor, that the court should have been given so little aid in a trial nearly seven months after our decision in *United States* v. *Palumbo*, 401 F.2d 270, 272-73 (2 Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), where we held that a trial judge does have power, in the exercise of sound discretion, to make an advance ruling prohibiting the use of a prior conviction for impeachment of a defendant "if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature

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of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly." However, we have declined to reverse a post-*Palumbo* conviction in another case where the judge asked for authority concerning his power to restrict cross-examination by the Government with respect to other crimes and was furnished none. *United States* v. *Zubkoff*, 416 F.2d 141, 143-44 (2 Cir. 1969). Even more important, there was no offer of proof with respect to Costa's testimony sufficient for the judge to compare the relevance of the prior conviction to credibility with the importance to Costa's defense of having him testify free from the prejudice which might be created by reference to it. Without this there is no "meaningful invocation of judicial discretion." *Hood* v. *United States*, 365 F.2d 949, 951 (D.C. Cir. 1966). See also *United States* v. *Cacchillo*, 416 F.2d 231, 234 (2 Cir. 1969). Furthermore, even if the judge's discretion had been properly invoked, he would have been well justified in refusing to rule that a counterfeiting conviction, represented to us as being fairly recent, could not be used for impeachment; a conviction for "uttering" false money could well be viewed as bearing on credibility, as one for uttering a false statement surely would. No different conclusion is required because the prosecution here invoked the inferences which the statute authorizes to be drawn from possession of hard narcotics, 21 U.S.C. §174;[3] the phrase "unless the defendant explains the possession to the satisfaction of the jury" does not mean that he must do this by taking the stand. See

[3] We adhere to our previous rulings concerning the constitutionality of this statute. *United States* v. *Bennett*, 409 F.2d 888 (2 Cir. 1969); *United States* v. *Cuadrado*, 413 F.2d 633, 636 (2 Cir. 1969).

United States v. *Gainey*, 380 U.S. 63, 69-71 (1965); *United States* v. *Secondino*, 347 F.2d 725, 727 (2 Cir.), *cert. denied*, 382 U.S. 931 (1965). The fact that, as a practical matter, this may be the only manner in which a defendant can explain the possession, may warrant more severe limitation on the Government's use of prior convictions for impeachment, but does not relieve the defense of the need to invoke the judge's discretion in a proper way.

Appellants' final point is that the evidence was insufficient. What they mean is that the agents were lying. That was for the jury.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of December one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,

HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ROBERT COSTA and MELVIN ELLIOTT,

Defendants-Appellants.

(and another case)

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of January, one thousand nine hundred and seventy.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ROBERT COSTA and MELVIN ELLIOTT,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant Robert Costa by notice of motion dated January 2, 1970 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is granted.

Before

STERRY R. WATERMAN

HENRY J. FRIENDLY

J. JOSEPH SMITH

Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1443

ROBERT COSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and a codefendant were convicted of selling heroin to a federal narcotics agent, in violation of 21 U.S.C. 174, and of conspiracy to commit the act, a violation of 18 U.S.C. 371. The petitioner was sentenced to imprisonment for five years on each count, the sentences to run concurrently. The court of appeals affirmed the convictions on December 15, 1969 (Pet. App. A). The petition for a writ of cer-

tiorari, which was filed on April 20, 1970, is substantially out of time under Rule 22(2) of the rules of this Court and should, accordingly, be denied. See Brief for the United States in *Schacht* v. *United States*, No. 628, this Term, pp. 9-21.

The petition in any event raises no issues warranting further review.

1. Petitioner contends that the trial court erred in refusing to compel disclosure of the government's informant in this case and to grant a one-day continuance in the trial. These contentions, as well as those addressed to the sufficiency of the evidence, are fully answered in the opinion below (Pet. App. A). The fact is that petitioner did discover the name of the informant by Tuesday, the second day of trial.[1] While the court refused a defense request for a continuance until Thursday and ordered the defense to proceed, the case was in fact adjourned until Thursday. As the court below noted, the "conduct of defense counsel before, during, and after trial indicates that they were more interested in preserving a point for appeal than in the off chance that the informer's testimony would help them" (Pet. App. 45).

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[1] The government's bill of particulars, served on September 28, 1968, alleged that the sale occurred in Room 3206 of the Americana Hotel, New York City, at 2:15 a.m. on August 5, 1967 (See Supp. Index to Record on Appeal, p. 17). During the first day of trial, there was evidence that this room was rented by the informant (Tr. 56, 101-104). By the second day of trial, the defense had determined that F. P. Stitman of Cleveland, Ohio, rented the room on August 5, 1967 (Tr. 169, 302). That afternoon the trial was adjourned when the defense rested without presenting evidence (Tr. 356-357).

2. The opinion below also fully answers the claim that the district court erred in refusing to make an advance ruling that, if the petitioner took the stand, the government would be barred from using his recent counterfeiting conviction for impeachment purposes. The petitioner's prior conviction for uttering false money was an act "which reflects adversely on a man's honesty and integrity." *Gordon* v. *United States*, 383 F. 2d 936, 940 (C.A. D.C.). In the absence of a clear "substantial chance of unfair prejudice", *United States* v. *Palumbo*, 401 F. 2d 270, 273 (C.A. 2), certiorari denied, 394 U.S. 947, use of the conviction for impeachment purposes would have been proper.

3. Petitioner's contentions as to the validity of the application here of the statutory inferences created by 18 U.S.C. 174 concern matters that were fully considered by this Court in *Turner* v. *United States*, 396 U.S. 398.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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[2] The punishment under 18 U.S.C. 174 (see Pet. 20, fn.) is not so great as to constitute cruel and unusual punishment. *United States* v. *Drotar*, 416 F. 2d 914, 916-917 (C.A. 5). See, also, *Gallego* v. *United States*, 276 F. 2d 914, 918 n. 4 (C.A. 9).

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